IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. JOHNSON

STATE OF NEBRASKA, APPELLEE,
V.
RODNEY JOHNSON, APPELLANT.

Filed May 25, 2010. No. A-09-685.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Steve Lefler for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

Rodney Johnson appeals an order of the district court for Douglas County, Nebraska, following his conviction on a charge of theft by deception, over $1,500. On appeal, Johnson asserts that the district court erred in not receiving certain exhibits into evidence and in finding sufficient evidence to support the conviction. We find no merit to Johnson's assertions on appeal, and we affirm. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

II. BACKGROUND

This case concerns an attempted sale of an automobile from Johnson to Andrew and Christina Griffith. Andrew testified that he saw a 2005 Dodge Magnum listed on an automobile sale Web site for $38,000 in September 2006. The seller was listed as RS Innovations, a company owned and run by Johnson and located in Nebraska. According to Andrew's testimony,

he spoke with Johnson by telephone on two occasions and Johnson never mentioned a price other than $38,000.

Christina is Andrew's mother, and she testified that she contacted Johnson about purchasing the automobile for her son. Christina testified that the car was "supposed to be owned by Ahman Green" and that Johnson indicated he "represented [Ahman] Green." Johnson informed Christina that the price listed in the advertisement was a misprint and that the asking price was actually $42,000 or $43,000. Christina offered to purchase the automobile for $35,000, and Johnson indicated that "he didn't think Ahman Green would take that, but . . . he would take it to him." Johnson then called Christina a day or so later and represented that "Ahman Green agreed to take $40,000." Christina then told Johnson that she would pay $37,000 and that "if he didn't agree to that he could keep the car." Johnson then contacted Christina and indicated that "he took it back to Ahman Green and . . . he agreed to it."

According to Christina, Johnson indicated that a $10,000 deposit needed to be paid and that "they would ship the car down [to Florida] and pay the shipping." Christina then transferred $10,000 to Johnson. According to Christina, Johnson then indicated to her that "Ahman Green said that he couldn't send the car to Florida without having the full amount of money first." Christina responded by transferring another $27,000. During this entire time, Christina was under the impression that she was purchasing the automobile from Ahman Green and that Johnson was representing him.

The automobile was delivered to Florida within approximately 1 week, but there was no title or bill of sale included with the automobile. In response to a telephone call, Johnson indicated that it must have been a mistake. Despite numerous telephone calls to Johnson, Christina never did receive the relevant paperwork concerning the purchase of the automobile.

In November 2006, Andrew was stopped by Florida police while driving the automobile. The vehicle had not yet been registered because Andrew and Christina had never received the title or bill of sale. The automobile was impounded. Johnson faxed an unsigned copy of the bill of sale to the impound lot so that Andrew and Christina could get the automobile released from the impound lot. Andrew was not able to drive the vehicle because he did not have the title showing ownership transferred to him. A number of e-mails were then exchanged discussing the title, but Johnson did not forward the title to Andrew and Christina.

Eventually, Johnson sent Christina an e-mail in August 2009 indicating to Christina that the automobile "was posted for sale online for 50 K" and indicating that he was left with "no choice but to request the remainder of the original sales price." In that e-mail, Johnson also indicated that "[A]hman has nothing to do with this car" and advised Christina that "[i]f [she] really want[ed] this resolved pay off the balance."

Christina eventually filed a complaint with authorities in Florida, and the case was referred to the Nebraska State Patrol. When the Nebraska State Patrol investigator spoke with Johnson, Johnson acknowledged selling the vehicle to Christina and acknowledged that he was actually leasing the vehicle from Chrysler when he sold it to Christina. Johnson informed the investigator that he and Christina had a verbal agreement for the sale of the automobile for $50,000, but acknowledged that there might have been some miscommunication on the price. Johnson acknowledged that Christina was under the impression that Green owned the automobile.

Evidence adduced at trial demonstrated that the title for the automobile had been issued to Daimler Chrysler Financial Services and that a new title had been issued in Johnson's name in September 2007. A "Nebraska Sales/Use Tax and Tire Fee Statement" indicated that Johnson purchased the automobile for $16,907.52. Chrysler still maintained a lien on the title at the time of trial.

On April 1, 2009, the district court found Johnson guilty of theft by deception, over $1,500. The court sentenced Johnson to 2 years' probation. This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Johnson assigns three errors that we consolidate for discussion to two. First, Johnson asserts that the district court erred in refusing to receive two proffered exhibits. Second, Johnson asserts that the district court erred in finding sufficient evidence to support a conviction.

IV. ANALYSIS

1. EXHIBITS

Johnson first asserts that the district court erred in refusing to receive two proffered exhibits. The district court sustained hearsay objections to both. We find no error in the court's ruling concerning these two exhibits.

Neb. Rev. Stat. § 27-801(3) (Reissue 2008) defines hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. On appeal, Johnson argues that the two exhibits should not have been excluded as hearsay because "there was a sufficient indicia of reliability with these documents to overcome a hearsay objection" and because "they were not offered to prove the truth of the matter asserted, but . . . to show [Johnson's] state of mind." Brief for appellant at 6. As such, it appears that Johnson is arguing, first, that the exhibits fit within the residual exception to the hearsay rule or, second, that the exhibits were not hearsay at all.

Neb. Rev. Stat. § 27-803(23) (Reissue 2008) provides that a statement, although technically hearsay, is still admissible if, although it is not specifically covered by any of the other enumerated exceptions, but having equivalent circumstantial guarantees of trustworthiness. The Nebraska Supreme Court has held that the residual hearsay exception is to be used rarely and only in exceptional circumstances and that particularized guarantees of trustworthiness must be shown from the totality of the circumstances. *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990).

Putting aside the several specific factors that must be demonstrated for hearsay to be admissible under the residual exception, see *State v. Castor*, 262 Neb. 423, 632 N.W.2d 298 (2001), we find that Johnson failed to demonstrate sufficient particularized guarantees of trustworthiness. In fact, the only "guarantees" of trustworthiness were Johnson's own testimony that the form was generated by a Web site and that he received it upon a submission by Christina. We find no merit to the argument that the residual hearsay exception provides an appropriate basis for reception of this evidence.

Johnson also argues that, in the alternative, the court should have found that the exhibits were not hearsay because they were not offered for the truth of the matter asserted therein. We similarly reject this argument. Johnson argues that the exhibits support his contention that the

selling price was $50,000 and were admissible, not for the truth of their assertion to that effect, but to show that he was not acting to intentionally deceive Christina. We disagree. As Johnson's argument suggests, the only relevance of these exhibits was to support his contention of precisely what he alleges the documents say: that the purchase price was $50,000 and not $37,000. We find no merit to Johnson's assignment of error concerning admissibility of these two exhibits.

2. Sufficiency of Evidence

Johnson next asserts that the district court erred in finding sufficient evidence to convict him of theft by deception. We find this assertion meritless.

Neb. Rev. Stat. § 28-512 (Reissue 2008) provides that a person commits theft if he obtains property of another by deception and provides that a person deceives if he intentionally creates or reinforces a false impression, including false impressions as to law, value, intention, or other state of mind.

As set forth above in the factual background portion of this opinion, Christina provided testimony establishing that Johnson created an impression that the automobile was owned by Green, that the selling price was $37,000, and that he would forward the necessary title paperwork once he received that amount of money, but failed to follow through and then demanded additional payments and began to contend that the actual selling price was $50,000. Eventually, Johnson indicated that Green actually had nothing to do with the automobile. Indeed, not only did Green not own the automobile, but neither did Johnson; the automobile was actually a leased vehicle, and at the time of trial, Chrysler continued to have a lien against the title. Although Johnson disputed this evidence, there was clearly sufficient evidence to support the court's ultimate conclusion of guilt. We reject Johnson's assignments of error to the contrary.

V. CONCLUSION

We find no error with the court's refusal to admit two proffered exhibits, and we find no error with the court's finding that there was sufficient evidence to support Johnson's conviction. We affirm.

Affirmed.